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June 12, 1992

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 92-51

Dear Ms. Searcy

Transmitted herewith on behalf of Texas Television, Inc. are an original and four copies, in accordance with Section 1.415 of its Comments in the above referenced proceeding.

Sincerely

Stanley S. Neustadt

Stanley S. Neustadt

Enclosure

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List A B C D E

BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 92-51
Regulations and Policies	)	
Affecting Investment	)	
in the Broadcast Industry	)	

COMMENTS OF TEXAS TELEVISION, INC.

Texas Television, Inc. (TTI), by its attorneys, submits these Comments in response to the Notice of Proposed Rule Making and Notice of Inquiry (NPRM) released by the Commission in the above-captioned proceeding on April 1, 1992. These Comments are addressed solely to that section of the NPRM which deals with security and reversionary interests in broadcast licenses. TTI respectfully urges that the Commission make no change whatsoever in its rules and policies which now prohibit third party creditors from obtaining security interests in the license of a broadcast station, and which prohibit a seller-creditor of a broadcast station from regaining control of the station by contract, even though in both instances assignment to the creditor would be subject to Commission approval. TTI submits that existing law precludes any procedure which even implies that a license is "property" of the licensee subject to extra-Commission judicial or other process. Moreover, any procedure which would permit either sellers or third party creditors to contract for rights to regain

or obtain control of a license would significantly dilute a basic and important tenet of broadcast regulation -- that the licensee must be in full control of the licensed facility. In support of this position, TTI states:

1. TTI is the licensee of television broadcast station KIII, Corpus Christi, Texas and the parent of the licensees of Station KUSI-TV, San Diego, California and television broadcast station KBMT, Beaumont, Texas. The Commission noted in the NPRM (¶20, n.28) that "only" six broadcast licensees opposed the change in Commission policy advanced by the petitioners herein. TTI is anxious for the Commission to realize that it and, it believes, many other licensees also oppose the proposed changes.

2. TTI urges that the Communications Act does prohibit security or reversionary interests in licenses per se. It would be foolhardy for TTI here to attempt a complete analysis of the provisions of the Communications Act and their legislative history in order to demonstrate that the Act does, indeed, require that result. The Commission itself has adverted to its own decisions which have reached this legal conclusion -- cases which establish beyond any doubt that no licensee, or, any other party, may have any property rights in a broadcast license. The split of opinion in recent bankruptcy court cases, or indeed any split on this subject among two lower courts, could hardly justify a contrary conclusion. Any such conclusion would be a ruling, no matter what the circumstances, that the bundle of rights which the license

conveys includes some rights which are characteristically associated with "ownership" of any property. This would constitute a reversal of 65 years of consistent rulings since the adoption of the Radio Act of 1927. As will be discussed below, such a reversal would go far toward eliminating the very special position of broadcasting in the statutory and regulatory scheme which has been in effect for all of that time.

3. The Commission's 1988 decision in Bill Welch, 3 FCC Rcd 6502, does not require or even support a contrary conclusion. Cellular radio, despite its name, is not broadcasting; it is similar in function to common carriage, and the regulatory scheme for broadcasting is vastly different from the scheme for common carriers. The holding in Welch was that an unbuilt construction permit for cellular radio could be assigned for a profit. The essence of the Commission's decision was that permitting such an assignment did not impinge on the basic rule that the licensee (permittee) had no property rights in the authorization. This decision was based on a careful analysis of the provisions of Section 301, 304 and 310 of the Communications Act. It was concluded that the Act, by implication if not expressly, includes among license rights the power to assign a permit for profit, and that in the cellular field such assignment would not violate public policy.

4. The critical distinction between Welch and the present proposals is that in Welch the assignor maintained complete control

over the permit, and that the assignee would have no control until the assignment was approved by the Commission. This is not true of security interests or reversionary interests, particularly those in broadcast licenses. Such interests, as the entire history of Commission broadcast regulation establishes, do create present interests which intrude on the licensee's control of the authorization. If the licensee can by its own action create such present interests in sellers or third parties, such actions transform the license and the rights granted thereunder into something much more like ordinary commercial "property".

5. It is this distinction which explains why a licensee may assign the license either to a third party creditor or to the person who assigned the license to him, subject to Commission approval, if the proposed assignment is a voluntary action by the licensee. In such cases the creditor or original seller has no control whatsoever over the licensee until and unless the licensee determines that the license should be assigned to such a party, and no control over the license until the Commission has approved the assignment. (Indeed, the Commission is very attentive to premature acquisition of control by the assignee during the period while the assignment application is pending before it, see Radio Management Services, FCC 92-195, released May 12, 1992.) On the other hand, however, where the original seller or third party creditor has legal rights with respect to the license, those rights impinge on control by the licensee or, stated otherwise, they diminish the

licensee's rights. This is permissible with respect to the physical equipment of a station, which is ordinary property, but is not permissible with respect to the license itself.

6. The bundle of rights awarded by the grant of a license for a broadcast station does not include any rights of ownership as against the Commission, see, e.g., FCC Form 301, Section VII, and the Commission's unchanged policy since the early days of broadcasting is that it is to the licensee that the Commission looks for effectuation of all governmental rules, policies and service to the public. This may not be diminished by permitting control to be shared by the licensee with any other party. The Commission's repeated affirmation of this basic principle of broadcast regulation was best summarized in The Yankee Network, Inc., 13 FCC 1014 (1949). In that case the Commission considered a lease arrangement which provided for payments to the lessor of 25% of the station's "gross billings" in excess of $12,000 per four week period. The Commission summarized prior cases, dating back to 1938, which dealt with the subject of rights of third parties in a license, to explain its policy against reverters (13 FCC at 1020):

> *** the assignee must have complete freedom to operate the station in the public interest, a freedom which inevitably carries with it the duty of independent decision. If such assignee subsequently chooses to dispose of his license, the public interest requires that a choice be made from the whole field of possible successors, and not be limited to the party from whom the facilities were obtained in the first instance.

The Commission noted, however, that in the case before it any right of reverter was expressly negated, and the lease was held in this respect to be unobjectionable. The Commission explained its denial of the application in the following terms (13 FCC at 1021):

> *** we believe in the instant case the lease agreement which allows the lessor to share in the gross revenue over and above $12,000 resulting from the combined operation of WAAB and WMTW should not be approved, even though the Yankee Network, lessor, provides for no reverter of the license in its lease contract and disavows any intention of exercising any control over the lessee, its programs, policies and plans of operation of the station as a proposed licensee. Nevertheless, such a provision for sharing in the gross profits, the right to participate in the business of the lessee, offers the opportunity to persuade, coerce or control the lessee in such a manner as to be inimical to the public interest, convenience and necessity.
>
> In the instant case Yankee Network will lose some of its financial investment in the physical facilities leased unless it shares in the gross profits of the lessee. The temptation to minimize the loss may be compelling at some time during the term of the lease, especially if there are no gross profits for several years. The methods of exerting control may be so subtle and difficult of proof that the Commission is unwilling to approve a transfer by lease agreement with a consideration the size of which is dependent upon the future operation of the facilities by the licensee.

7. These policies have been continually enforced by the Commission since then. Only seven years ago, in Minority Ownership in Broadcasting, 99 FCC 2d 1249, the Commission reaffirmed the validity of these analyses in circumstances strikingly similar to those now being considered by the Commission. The Commission in that Report and Order refused to expand seller-creditor rights in order to stimulate minority acquisition of broadcast properties.

It was argued by proponents that such expansion would promote the infusion of capital which would more readily enable minorities to acquire broadcast properties. The Commission noted that a broadcast license does not confer a property right, but only a valuable, limited privilege to utilize the air waves. For that reason, the Commission noted, a license could not be subject to reversionary interest, mortgage, lien, pledge or any other form of security interest (citing Radio KDAN, Inc. 11 FCC 2d 934, 1968, at n. 12). It concluded, in addition, (99 FCC 2d at 1254):

> *** the Commission is acutely aware of the lack of financing available to capitalize minority broadcast ventures. We have already undertaken various measures to enhance minority ownership, including expansion of the use of distress sales and the availability of tax certificates. We are committed to continuing our efforts in this area. However, for the reasons noted herein, we have decided to continue to rely on the alternatives currently available to minority buyers, rather than adopting the proposals contained in the Notice.

8. It is a basic principle of administrative law that if an agency reaches apparently inconsistent conclusions in contemporaneous cases or basically alters a long held policy or rule of law, it must set forth the reasons for the apparent inconsistency or change. The NPRM does not provide even a hint of the required grounds for the change proposed in this proceeding. To the extent that the petitioners have attempted to supply a rational basis for the change, they have, thus far, utterly failed to do so. They urge merely that more capital should be available to the broadcast industry and that the easing of credit might

foster the entry of minorities and other newcomers into the field (NPRM ¶19). This argument is strikingly similar to the one rejected by the Commission in Minority Ownership in Broadcasting.

9. A showing adequate to support the proposed changes would have to be based, at the very least, on an analysis which establishes that the benefits to the public interest which would flow from the proposed changes outweigh the detriments. The petitioners, as has been noted, have urged benefits with respect to new entrants into broadcasting which have been held by the Commission to be inadequate. The introduction to the NPRM as a whole suggests further that the capital demands of broadcasting are likely to increase in the future (NPRM ¶1). TTI takes no position herein on the various other devices proposed or to be considered for increasing the availability of capital which do not involve a basic change in the fundamental regulatory structure of broadcasting. TTI respectfully suggests that this vague objective would not be significantly furthered by the proposed changes. Undoubtedly there has been a reduction in the availability of capital for broadcasting, but it is difficult to separate this result from the economic malaise to which our overall economy has been subjected. The Commission itself has issued a Working Paper (Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd. 3996 (1991)) which paints a bleak long-range picture for television broadcasting due to increased competition from other media. It

contains no basis for potential lenders to be confident or optimistic about investment in broadcasting. Surely, providing additional security interests is not any more likely to ameliorate the problems of broadcasting than activity by banks and other lending institutions were able to prevent or ameliorate the deep crisis in housing which is integral to the present recession. This is particularly true because existing permissible security arrangements, such as stock pledges from corporate borrowers, provide almost as much protection for the lender as would the changes proposed herein. To the extent that the consolidation of broadcast interests adopted (and proposed) in other proceedings by the Commission might be relied on to improve broadcasting's competitive position, it is doubtful whether the proposed changes in security interests would affect such consolidations; the large institutional broadcasters will probably have access to the capital they need for such consolidations.

10. Much of the detriment that would result from the proposed changes has been discussed above. They would result in some loss of FCC control over broadcasting, because the licensees might be sharing some control over the use of the license with third parties over whom the Commission has no regulatory jurisdiction. Even more significantly, adoption of the proposed changes would be a signal to the country that in the Commission's view a broadcast license is no longer a set of rights totally suffused with the public interest, but merely another piece of commercial property to be

dealt with as though the industry were not a very special one with very special obligations to the public.

11. The special nature of broadcasting and its obligations to the public have been keystone of broadcast regulation and, indeed, a basis for federal regulation since the earliest days of radio. In 1925, addressing the Fourth National Radio Conference, then Secretary of Commerce, Herbert Hoover, said:

> The ether is a public medium, and its use must be for a public benefit. The use of a radio channel is justified only if there is public benefit. The dominant elements for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution. There is no proper line of conflict between the broadcaster and the listener, nor would I attempt to array one against the other. Their interests are mutual, for without the one the other could not exist. (quoted in Robinson, The Federal Communications Act: An Essay on Origins and Regulatory Purpose in A Legislative History of the Communications Act of 1934, Oxford University Press (1989).

Respectfully submitted

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